

SERVICE DATE - JUNE 1, 2000

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND  
MISSOURI PACIFIC RAILROAD COMPANY—CONTROL AND MERGER—SOUTHERN  
PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION  
COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND  
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

Decision No. 89

Decided: May 31, 2000

In this decision concerning two UP/SP merger conditions, we find that a particular shipper is a “2-to-1” shipper entitled to service of an additional rail carrier under the BNSF agreement’s omnibus clause, but that the “contract modification” condition does not apply.<sup>1</sup>

BACKGROUND

On August 12, 1996, we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation and those controlled by Southern Pacific Rail

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<sup>1</sup> We address here the matters raised in the following pleadings: the petition “for clarification and enforcement of merger conditions” filed January 19, 2000, by Ameren Services Company on behalf of Union Electric Company d/b/a AmerenUE (these companies are referred to collectively as UE); the UP/SP-374 “response” filed February 8, 2000, by Union Pacific Railroad Company; the BNSF-90 “reply” filed February 8, 2000, by The Burlington Northern and Santa Fe Railway Company; the UE “reply” filed February 23, 2000, by UE; and the UP/SP-375 “reply” filed March 3, 2000, by Union Pacific Railroad Company. That these matters may be addressed on the most complete record available, the request for leave to file UE’s February 23rd reply (at 1 n.2 of that reply) and the request for leave to file the UP/SP-375 reply (at UP/SP-375 at 2) will be granted, and these two replies will be accepted for filing and made part of the record in this proceeding. We also address the BNSF-91 petition filed May 2, 2000, involving the same or similar issues presented here.

Corporation.<sup>2</sup> We imposed various conditions to protect 2-to-1 shippers and points,<sup>3</sup> including, as relevant here, the BNSF agreement's omnibus clause and the contract modification condition.

The omnibus clause was included in the BNSF agreement<sup>4</sup> to protect the relatively few 2-to-1 points that were not explicitly covered by the trackage rights and line sales provided for in that agreement. Such additional 2-to-1 points, the UP/SP applicants insisted, were "covered by the agreement's 'omnibus' clause (Section 8i), which, they maintain[ed], represents a commitment by UP/SP to enter into arrangements with BNSF under which, 'through trackage rights, haulage, ratemaking authority or other mutually acceptable means,' BNSF will be able to provide competitive service to all 2-to-1 shippers not covered by the trackage rights and line sales provided for in the agreement." Merger Dec. No. 44, 1 S.T.B. at 252.

The contract modification condition required UP/SP "to make immediately available to BNSF at least 50% of the volume under contract at 2-to-1 points on all of the BNSF trackage rights corridors." Merger Dec. No. 44, 1 S.T.B. at 373. This condition "applies to every contract entered into prior to the consummation of the merger by a 2-to-1 shipper, on the one hand, and either UP or SP, on the other hand, provided only that such contract (i) was negotiated under the auspices either of old 49 U.S.C. 10713 or of new 49 U.S.C. 10709, and (ii) was in effect at the time the merger was consummated. A 2-to-1 shipper may tender to BNSF, and BNSF may transport, up to 50% of the volume covered by any contract to which the contract modification condition applies; and a shipper's obligation to ship traffic via UP/SP is waived to the extent that

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<sup>2</sup> See Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (Merger Dec. No. 44), aff'd Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999). Common control was consummated on September 11, 1996. With respect to the period ending September 10, 1996, "UP" refers to the rail carriers then controlled by Union Pacific Corporation, and "SP" refers to the rail carriers then controlled by Southern Pacific Rail Corporation. With respect to the period beginning September 11, 1996, "UP" refers to the combined UP/SP system.

<sup>3</sup> In the context of the UP/SP merger, a 2-to-1 shipper (sometimes referred to as a 2-to-1 "customer") is a shipper that, prior to the merger, had rail service from UP and SP and no other railroad. See Merger Dec. No. 44, 1 S.T.B. at 252. Similarly, a 2-to-1 point is a point at which, prior to the merger, service was provided by UP and by SP, but by no other railroad. Id.

<sup>4</sup> The BNSF agreement, entered into by UP/SP and BNSF (The Burlington Northern and Santa Fe Railway Company and its predecessors are referred to as BNSF), was the agreement pursuant to which BNSF received various merger-related rights, most prominently trackage rights over thousands of miles of UP/SP lines. See Merger Dec. No. 44, 1 S.T.B. at 247 n.15, 252-54. The terms of the BNSF agreement, including (among many other terms) the omnibus clause, were imposed as conditions. See Merger Dec. No. 44, 1 S.T.B. at 246-47.

traffic is tendered to BNSF under the auspices of the contract modification condition.” Merger Dec. No. 57, slip op. at 9.<sup>5</sup>

UE operates a coal-fired electric generating plant at Labadie, Franklin County, MO, which was accessed, prior to the UP/SP merger, by UP and by SP and by no other railroad. There is no dispute as to the 2-to-1 status of UE’s Labadie plant: UE and UP agree that, in the context of the UP/SP merger, UE is, as respects its Labadie plant, a 2-to-1 shipper. The dispute, rather, concerns the applicability of the omnibus clause and the contract modification condition. UE contends that its 2-to-1 status makes the clause and the condition applicable to its Labadie plant. UP insists that, 2-to-1 status notwithstanding, the clause and the condition are not applicable at Labadie.<sup>6</sup>

## DISCUSSION AND CONCLUSIONS

We conclude that UE is covered by the omnibus clause but is not entitled to exercise the contract modification condition.

Omnibus Clause. The omnibus clause recites “the intent of the parties” (i.e., UP/SP and BNSF, the parties to the BNSF agreement) that the BNSF agreement “result in the preservation of service by two competing railroad companies for all customers listed on Exhibit A to this Agreement presently served by both UP and SP and no other railroad (2-to-1 customers).” The omnibus clause recognizes, however, that “some 2-to-1 customers will not be able to avail themselves of BNSF service by virtue of the trackage rights and line sales contemplated by this Agreement.” The omnibus clause next lists, by way of “example,” certain points at which 2-to-1 customers “are not accessible under the trackage rights and line sales” provided for in the BNSF agreement. The omnibus clause then concludes as follows: “Accordingly, UP/SP and BNSF agree to enter into arrangements under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service to 2-to-1 customers at the foregoing points and to any 2-to-1 customers who are not located at

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<sup>5</sup> In Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 57 (STB served Nov. 20, 1996) (Merger Dec. No. 57), we set out a series of guidelines to govern the implementation of the contract modification condition.

<sup>6</sup> All references in this decision to UE refer to UE at Labadie. Nothing in this decision is intended to apply to any UE facility located at any other point.

points expressly referred to in this Agreement or Exhibit A to this Agreement.” (Emphasis added.)<sup>7</sup>

The omnibus clause, read literally, clearly extends to UE, a 2-to-1 customer not located at a point expressly referred to in the BNSF agreement or in Exhibit A to the BNSF agreement. Nothing in the text of the omnibus clause gives any indication that UP/SP intended that the omnibus clause would only selectively reach the “2-to-1 customers who are not located at points expressly referred to in this Agreement or Exhibit A to this Agreement.”

A literal reading of the omnibus clause is consistent with two representations ( the Rebensdorf/Peterson or R/P representations) made in the UP/SP application. Mr. Rebensdorf, a UP/SP witness, acknowledged that Labadie was not expressly mentioned in the omnibus clause, but represented that Labadie was “covered,” reflecting “the parties’ commitment to preserve two-railroad competition for all 2-to-1 customers, including those at points not specifically listed in the [BNSF] settlement agreement.” See UP/SP-22 (filed Nov. 30, 1995) at 297 n.1 (emphasis in original).<sup>8</sup> Mr. Peterson, another UP/SP witness, also acknowledged that Labadie was not expressly listed in the omnibus clause, but represented that “in all events the Labadie plant is covered by the ‘omnibus’ clause.” See UP/SP-23 (filed Nov. 30, 1995) at 166-67.<sup>9</sup> The conclusion is inescapable: as of November 30, 1995 (the date of filing of the UP/SP application), UE’s Labadie plant was indeed covered by the omnibus clause.

UP insists, however, that UE is not now covered by the omnibus clause. UP cites a UP/UE “conceptual framework” document (the CF document), a UE letter supporting the UP/SP merger, and part though not all of the text of the R/P representations. We shall consider these in turn.

The CF document is dated March 11, 1996, and was signed by UE on March 14, 1996. See UP/SP-374, Exhibit 8. This document, which UP refers to as a “settlement agreement,” provides for proportional rates for UE’s use in conjunction with BNSF coal service via Kansas City or St. Louis, and (according to UP) “saved UE millions of dollars and secured a

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<sup>7</sup> There have been several iterations of the omnibus clause; the two most important iterations (for present purposes) are set forth in their entirety in Appendix A to this decision.

<sup>8</sup> The text of the Rebensdorf representation is set forth in its entirety in Appendix B to this decision.

<sup>9</sup> The text of the Peterson representation is also set forth in its entirety in Appendix B to this decision.

competitive alternative to the Labadie plant.” UP/SP-374 at 5.<sup>10</sup> The CF document clearly indicates that UE had negotiated a proportional rate arrangement with UP. What the CF document does not clearly indicate, however, is that this proportional rate arrangement was intended to take Labadie out of the omnibus clause. Indeed, there is nothing at all in the text of the CF document that can be read as withdrawing Labadie from the otherwise applicable reach of that clause.<sup>11</sup>

The UE support letter, which is dated March 25, 1996, and which was included in the record on March 29, 1996,<sup>12</sup> indicates that UE and UP “have reached an agreement [the reference is apparently to the CF document] that will insure on-going competition for rail service to the Labadie Plant after the merger. Because of this agreement, the Union Pacific/Southern Pacific merger is in the best interests of Union Electric, and UE supports the merger application.” UP/SP-374, Exhibit 9. The UE support letter clearly indicates that, because UE and UP had reached an agreement, UE had decided to express its support for the UP/SP merger. But the UE support letter does not indicate any intention by UE to waive whatever rights it might have under the omnibus clause. There is simply nothing in the text of the UE support letter that can be read as a restriction on the otherwise applicable scope of that clause. Nor is there anything in the text of the UE support letter that indicates that the agreement that UE and UP had reached had withdrawn Labadie from the otherwise applicable scope of the omnibus clause.

The R/P representations, which, as previously noted, are set forth in full in Appendix B to this decision, indicate that, at the time the UP/SP application was filed, UP/SP was attempting to negotiate, with UE, an arrangement to preserve two-railroad competition at Labadie that would not involve direct access by BNSF. UP argues that the proportional rate arrangement provided for in the CF document preserved two-railroad competition at Labadie without direct access by BNSF,<sup>13</sup> and thus amounted to the arrangement anticipated by the R/P representations. UP

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<sup>10</sup> For purposes of this decision, we will assume that UP is correct in its assertion that, under Missouri law, the CF document was at the time of its execution, and continues to be at the present time, a valid and enforceable contract.

<sup>11</sup> UP argues that there is no basis upon which to “release” UE from the UP/UE “settlement agreement” and/or to void that agreement. UP/SP-374 at 2, 5. We are neither releasing UE from that agreement nor voiding that agreement as to UE. We are merely holding that this agreement does not narrow the otherwise applicable reach of the omnibus clause.

<sup>12</sup> See UP/SP-195 (dated March 29, 1996), the relevant portion of which is excerpted in UP/SP-374, Exhibit 9.

<sup>13</sup> There is a dispute whether the proportional rate arrangement provided for in the CF  
(continued...)

further argues that the “agreement” embodied in the CF document takes Labadie out of the omnibus clause. But, as stated previously, the CF document gives no indication that the proportional rate arrangement provided in it was intended to supersede, as respects UE, the otherwise applicable reach of the omnibus clause.

The most that can be said in support of UP’s argument is that, when the UP/SP application was filed, UP apparently intended that the execution of a UP/UE “settlement agreement” would remove Labadie from the otherwise applicable reach of the omnibus clause.<sup>14</sup> There is, however, no indication in the record, and no reason to believe, that UE ever intended that result.<sup>15</sup> We realize, of course, that there is some force in UP’s argument that UE’s long delay in asserting its omnibus clause rights suggests that, until recently, UE shared UP’s understanding that the execution of the CF document had removed Labadie from the otherwise applicable reach of the omnibus clause. We believe, however, that the more plausible explanation for UE’s long delay is that, until recently, UE was unaware of the implications of the omnibus clause.<sup>16</sup>

One final consideration seals our conclusion that UE is covered by the omnibus clause, notwithstanding UE’s long delay in asserting its rights under the clause. In the several months following the March 1996 execution of the CF document, UP had at least two opportunities (its

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<sup>13</sup>(...continued)  
document did in fact effectively preserve the intramodal competition that existed at Labadie prior to the UP/SP merger.

<sup>14</sup> See, in particular, UP/SP-374, Exhibit 10 (a UP letter to UE, dated December 6, 1995, indicating that Labadie is not specifically referred to in the omnibus clause because “our expectations have been that we would find an alternative for Labadie that does not require implementation of the provision there.”).

<sup>15</sup> There is, by way of example, no written indication that UE ever shared the “expectations” voiced by UP in the UP letter dated December 6, 1995.

<sup>16</sup> UE has attempted to explain its long delay in asserting its omnibus clause rights by shifting the blame to UP. UE alleges, in essence, that, beginning with the negotiations that resulted in the CF document and continuing ever since, UP has engaged in a campaign of fraud and deceit with the intent of denying UE its rights as a 2-to-1 shipper. The pivotal misrepresentation complained of by UE is said to have occurred during the negotiations that resulted in the CF document: UP, UE insists, never fully explained to UE the mechanics of the omnibus clause. But there is no indication that UP misrepresented material facts. Moreover, the details of the omnibus clause, including the specifics of the R/P representations with respect to it, were, as of November 30, 1995, matters of public record.

April 29, 1996 rebuttal submission, and its June 3, 1996 brief) to indicate, on the record, that, in its opinion, the CF document had narrowed the scope of the omnibus clause. UP, however, has not cited, and we have been unable to find, any such indications, either in UP's rebuttal submission or in its brief. There are, in the rebuttal submission, explicit references to the omnibus clause,<sup>17</sup> but there is no indication that the scope of that clause has been narrowed in any way. There is even, in the rebuttal submission, an explicit reference to the omnibus clause in connection with a "separate understanding" that UP had come to with UE (the context confirms that this "separate understanding" is the CF document), but, again, there is no indication that the omnibus clause has been narrowed in any way.<sup>18</sup>

We therefore conclude that UE is covered by the omnibus clause. Accordingly, UP and BNSF should negotiate an arrangement "under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service" to UE at Labadie.<sup>19</sup> If such negotiations fail to produce a "mutually acceptable" resolution, and/or if such negotiations fail to produce a resolution acceptable to UE:

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<sup>17</sup> See UP/SP-230 (the UP/SP "narrative," filed Apr. 29, 1996) at 135. See also UP/SP-231 (also filed Apr. 29, 1996), Vol. 2B (Peterson rebuttal statement) at 29.

<sup>18</sup> See UP/SP-231 (filed Apr. 29, 1996), Vol. 2C, Rebensdorf rebuttal statement (Tab 18) at 7.

<sup>19</sup> UE insists that BNSF should be given trackage rights access to Labadie via both Kansas City and St. Louis. This is a possible, but not necessarily the only, conceivable outcome. The omnibus clause does not explicitly require UP to grant BNSF trackage rights access to Labadie, nor does that clause explicitly require that BNSF be given access to Labadie from both ends of the Kansas City-St. Louis line. The omnibus clause, rather, requires only that UP enter into an arrangement with BNSF "under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service" to UE at Labadie.

(1) BNSF will submit the matter to arbitration in accordance with the terms of the BNSF agreement;<sup>20</sup> and/or (2) UE will seek relief here, in an administrative proceeding.<sup>21</sup>

To avoid possible confusion, we clarify that our decision today does not rest upon Section 8(l) of the BNSF agreement, which provides that if, “for any reason, any of the trackage rights granted under this Agreement cannot be implemented because of the lack of sufficient legal authority to carry out such grant, then UP/SP shall be obligated to provide an alternative route or routes, or means of access of commercially equivalent utility at the same level of cost to BNSF as would have been provided by the originally contemplated rights.”<sup>22</sup> UE suggests that Section 8(l) was made applicable to Labadie by UP’s post-merger sale of the SP line over which SP formerly provided service at Labadie; this sale, UE contends, has made the SP line unavailable through no fault of UE or BNSF.<sup>23</sup> Section 8(l), however, applies only with respect to trackage

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<sup>20</sup> Section 15 of the BNSF agreement provides: “Unresolved disputes and controversies concerning any of the terms and provisions of this Agreement or the application of charges hereunder shall be submitted for binding arbitration under [the] Commercial Arbitration Rules of the American Arbitration Association which shall be the exclusive remedy of the parties.” See UP/SP-303 (UP’s July 1, 1997 Progress Report), Exhibit B at 27-28 (Exhibit B contains the BNSF agreement, “amended and restated” as of June 30, 1997).

<sup>21</sup> The BNSF agreement “provide[s] rights and claims (and, by implication, remedies) to persons other than the [parties to that agreement],” Merger Dec. No. 44, 1 S.T.B. at 247 n.15. However, because the arbitration provision of the BNSF agreement applies only to the parties to that agreement, a shipper seeking to vindicate its rights under that agreement can seek relief in an administrative proceeding. See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 72, slip op. at 8 n.18 (STB served May 23, 1997) (“We wish to clarify that shippers have rights under the BNSF agreement because we have imposed the terms thereof as a condition to the merger. These shipper rights, however, are not contract rights enforceable in courts. Rather, shippers have recourse to the Board for enforcement of the merger conditions.”).

<sup>22</sup> See UP/SP-303, Exhibit B at 18.

<sup>23</sup> The contract under which the SP line was sold bars the purchaser from providing rail service to UE at Labadie. See UP/SP-374, Exhibit 2 at 5 (this detail was submitted under seal, but we think it necessary to put this detail in the public record; were it not for the prohibition against service to UE at Labadie, UE would presently have, at least as respects traffic moving via (continued...)



rights granted under the BNSF agreement. Section 8(l) is irrelevant as respects UE because BNSF has not yet been granted, under the BNSF agreement, any trackage rights to Labadie.

Contract Modification Condition. The UP/UE contract at issue here (ICC-WRPI-C-0080) was entered into prior to the consummation of the merger by a 2-to-1 shipper, on the one hand, and UP, on the other hand; it was negotiated under the auspices of old 49 U.S.C. 10713; and it was in effect at the time the merger was consummated. It therefore follows that, at the time the merger was consummated, the contract modification condition applied to this contract.<sup>24</sup>

The contract modification condition, however, applies only to contracts that were “in effect at the time the merger was consummated,” Merger Dec. No. 57, slip op. at 9, and must be exercised “prior to the expiration of a contract” to which that condition applies,” Merger Dec. No. 57, slip op. at 10. The ICC-WRPI-C-0080 contract was amended in 1999 by an “Addendum Three,” and we agree with UP’s assessment that this addendum amounted to “major surgery” on the underlying contract. See UP/SP-374 at 18-22; UP/SP-374, Exhibit 1 at 7-8. Most of the relevant details have been submitted under seal, and properly so (and, given the essentially financial nature of these details, we are reluctant to put these details into the public record). We believe, however, that because Addendum Three relieved UE of “significant liabilities,” UP/SP-374 at 22, the ICC-WRPI-C-0080 contract, as amended by Addendum Three, should not be regarded, for contract modification condition purposes, as the contract that was in effect at the

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<sup>23</sup>(...continued)

St. Louis, the intramodal competitive option that it seeks under the auspices of the omnibus clause). See also UE’s February 23rd reply at 6, and BNSF-90 at 6 n.6 (strong hints as to the nature of this detail are already in the public record).

<sup>24</sup> The argument that execution of the CF document made the contract modification condition inapplicable to this contract is no more persuasive than the similar argument that execution of that document took UE out of the reach of the omnibus clause. Neither Merger Dec. No. 44 nor Merger Dec. No. 57, nor any of the various submissions made by the UP/SP applicants during the course of the UP/SP merger proceeding, gives any indication that the reach of the contract modification condition had been narrowed by the CF document; nothing in the CF document itself gives any indication that the proportional rate arrangement provided in it was intended to supersede, as respects UE, the otherwise applicable reach of the contract modification condition; and nothing in the UE support letter gives any indication that UE, in expressing support for the UP/SP merger, had any intention whatsoever of waiving whatever rights it might have under that condition. Nevertheless, the Board herein finds the contract modification condition inapplicable but for other reasons.

time the UP/SP merger was consummated. We therefore conclude that the contract modification condition does not now apply to this contract.<sup>25</sup>

BNSF Petition. In its BNSF-91 petition filed May 2, 2000, BNSF seeks an order declaring that, as a result of the UP/SP merger, the UE plant at Labadie is a “2-to-1” shipper to which BNSF may gain access under the “omnibus” clause of the BNSF agreement and under the “2-To-1 Point Identification Protocol” entered into by BNSF and UP in June 1998. UP and UE filed replies to the BNSF-91 petition on May 22, 2000 (the UP reply is designated UP/SP-377; the UE reply is not designated). In view of the action taken in this decision with respect to UE’s January 19th petition, the BNSF-91 petition will be dismissed as moot.<sup>26</sup>

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UE’s request for leave to file its February 23rd reply and UP’s request for leave to file its UP/SP-375 reply are granted, and these two replies are accepted for filing and made part of the record in this proceeding. The BNSF-91 petition is dismissed as moot.

2. UE’s January 19th petition “for clarification and enforcement of merger conditions” is granted in part and denied in part, as indicated in this decision.

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<sup>25</sup> There is a dispute whether the amended ICC-WRPI-C-0080 contract amounts to a “new” contract as that term is understood in Missouri law. We think it sufficient to say that, new or not new, we never intended that the contract modification condition would apply to a contract that had received the kind of post-merger “major surgery,” UP/SP-374 at 19, that this contract has received.

<sup>26</sup> Because the BNSF-91 petition adds nothing to the matters previously submitted by UE, UP, and BNSF, the purpose this petition was intended to serve is not immediately apparent. Even the supposed issue respecting the propriety of UP’s rejection, under the auspices of the 2-To-1 Point Identification Protocol, of BNSF’s request for access to Labadie had already been presented on the record. Compare BNSF-91, Attachment C (UP’s letter, dated Feb. 7, 2000, rejecting access to Labadie) with BNSF-90, Attachment A (the very same letter).

3. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn. Vice Chairman Burkes commented with a separate expression.

Vernon A. Williams  
Secretary

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Vice Chairman Burkes, commenting:

I agree with the Board's decision that AmerenUE is a "2-to-1" shipper entitled to service of an additional rail carrier under the BNSF agreement's omnibus clause. However, I disagree with the conclusion that the contract modification condition does not now apply to this contract.

The contract modification condition applies to contracts that were "in effect at the time the merger was consummated." Although the contract was amended, it does not eliminate the fact that the original contract, ICC-WRPI-C-0080, was in effect at the time the merger was consummated. Moreover, the amendment at issue states that "nothing herein contained shall be construed as amending or modifying [the contract] except as herein provided." I disagree with the conclusion that the amendment amounted to "major surgery" to the contract. Furthermore, I believe that nothing in this decision should foreclose BNSF's right to immediate access to AmerenUE's Labadie plant for the traffic not already committed under the amended UP contract.

## APPENDIX A: THE OMNIBUS CLAUSE

The two most important (for present purposes) iterations of the omnibus clause (i.e., Section 8i of the BNSF agreement) are set forth in this appendix. These two versions are, for present purposes, identical.

As of March 1996. Throughout March 1996, the omnibus clause of the BNSF agreement read in its entirety as follows:<sup>27</sup>

It is the intent of the parties that this Agreement result in the preservation of service by two competing railroad companies for all customers listed on Exhibit A to this Agreement presently served by both UP and SP and no other railroad (2-to-1 customers).

The parties recognize that some 2-to-1 customers will not be able to avail themselves of BNSF service by virtue of the trackage rights and line sales contemplated by this Agreement. For example, 2-to-1 customers located at points between Niles Junction and the end of the joint track near Midway (including Livermore, CA, Pleasanton, CA, Radum, CA, and Trevarno, CA), Turlock, CA, South Gate, CA, Tyler, TX, Defense, TX, College Station, TX, Great Southwest, TX, Victoria, TX, Sugar Land, TX, points on the former Galveston, Houston & Henderson Railroad served only by UP and SP, Opelousas, LA, Paragould, AR, Dexter, MO, and Herington, KS, are not accessible under the trackage rights and line sales covered by this Agreement. Accordingly, UP/SP and BNSF agree to enter into arrangements under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service to 2-to-1 customers at the foregoing points and to any 2-to-1 customers who are not located at points expressly referred to in this Agreement or Exhibit A to this Agreement.

BNSF shall have the right to interchange with any short-line railroad which, prior to the date of this Agreement could interchange with both UP and SP and no other railroad.

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<sup>27</sup> See UP/SP-22 at 352-53 (this is the amended version of the omnibus clause that was contained in the so-called “supplemental agreement” dated Nov. 18, 1995).

As of today. The omnibus clause of the BNSF agreement presently reads in its entirety as follows.<sup>28</sup>

It is the intent of the parties that this Agreement result in the preservation of service by two competing railroad companies for all customers listed on Exhibit A to this Agreement presently served by both UP and SP and no other railroad (2-to-1 customers).

The parties recognize that some 2-to-1 customers will not be able to avail themselves of BNSF service by virtue of the trackage rights and line sales contemplated by this Agreement. For example, 2-to-1 customers located at points between Niles Junction and the end of the joint track near Midway (including Livermore, CA, Pleasanton, CA, Radum, CA, and Trevarno, CA), Lyoth, CA, Lathrop, CA, Turlock, CA, South Gate, CA, Tyler, TX, Defense, TX, College Station, TX, Great Southwest, TX, Victoria, TX, Sugar Land, TX, points on the former Galveston, Houston & Henderson Railroad served only by UP and SP, Opelousas, LA, and Herington, KS, are not accessible under the trackage rights and line sales covered by this Agreement. Accordingly, UP/SP and BNSF agree to enter into arrangements under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service to 2-to-1 customers at the foregoing points and to any 2-to-1 customers who are not located at points expressly referred to in this Agreement or Exhibit A to this Agreement.

BNSF shall have the right to interchange with any short-line railroad which, prior to the date of this Agreement could interchange with both UP and SP and no other railroad.

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<sup>28</sup> See UP/SP-303, Exhibit B at 17.

APPENDIX B: THE REBENDSORF/PETERSON REPRESENTATIONS

Rebendorf Representation. The full text of the Rebendorf representation, which appears in the verified statement of John H. Rebendorf, the then Vice President - Strategic Planning for Union Pacific Railroad Company, reads as follows:<sup>29</sup>

The one exception [i.e., the only 2-to-1 point of which the UP/SP applicants were then aware that (a) was not reached by the trackage rights or line sales provided for in the then most recent version of the BNSF agreement, and (b) was not mentioned by name in the omnibus clause] is Labadie, Missouri, where we are working directly with the “2-to-1” shipper, Union Electric, to negotiate an arrangement to preserve two-railroad competition. BN/Santa Fe has agreed not to object to UP/SP seeking an arrangement, even with another railroad, to preserve rail competition for Union Electric. Nonetheless, even though the “omnibus” clause does not expressly mention Labadie, Labadie is covered by the clause, which expresses the parties’ commitment to preserve two-railroad competition for all 2-to-1 customers, including those at points not specifically listed in the [BNSF] settlement agreement.

Peterson Representation. The full text of the Peterson representation, which appears in the verified statement of Richard B. Peterson, the then Senior Director - Interline Marketing for Union Pacific Railroad Company, reads as follows:<sup>30</sup>

A handful of small “2-to-1” points, such as Herington, Kansas, and Dexter, Missouri, were not covered by the trackage rights that we negotiated with BN/Santa Fe, and we agreed on an “omnibus” clause, Section 8i of the agreement, committing the parties to enter into arrangements, such as trackage rights, haulage or ratemaking authority, that will ensure two-railroad competition for jointly-served shippers at these points, as well as for any other “2-to-1” shippers that our investigation may not have located. All such points of which we are aware are listed in section 8i except one, the Union Electric Plant at Labadie, Missouri, 43 miles from St. Louis. That point is also covered by the “omnibus” clause, but BN/Santa Fe was agreeable to our entering into an arrangement with Union Electric for service by a different railroad (there

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<sup>29</sup> See UP/SP-22 at 297 n.1.

<sup>30</sup> See UP/SP-23 at 166-67.

are multiple candidates at St. Louis), or for some other form of continued rail competition. We are continuing to discuss this with Union Electric, but in all events the Labadie plant is covered by the “omnibus” clause.